

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 11-40831)	
)	
VIRGIL C. VON TOBEL)	
)	
Debtor)	
)	
)	
WILLIAM DALE RICKS)	
JANET RUTH RICKS)	
)	
Plaintiffs)	
)	
vs.)	
)	
VIRGIL VON TOBEL)	
)	
Defendant)	

PROC. NO. 12-4001

DECISION

At Fort Wayne, Indiana, on January 25, 2013

This adversary proceeding arises out of a contract between the plaintiffs and the defendant, who was doing business as Rainbow International of Rensselaer, in which he agreed to perform restoration services to the plaintiffs’ house which had been damaged by a fire. The issue before the court is not whether the defendant breached that contract or whether the plaintiffs have been damaged as a result – they clearly have been. Rather, the issue is whether the obligations arising out of the defendant’s failure to fulfill the terms of the agreement constitute a non-dischargeable debt under § 523(a)(2)(A) and/or § 523(a)(6) of the United States Bankruptcy Code. The matter is before the court following trial of those issues.

Section 523(a)(2) excepts from the scope of a debtor’s discharge debts “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – false

pretenses, a false representation, or actual fraud” 11 U.S.C. § 523(a)(2)(A). Section 523(a)(6) does the same for debts due to “willful and malicious injury” 11 U.S.C. § 523(a)(6). Both exceptions are narrowly construed in favor of the debtor. Ojeda v. Goldberg, 599 F.3d 712, 718 (7th Cir. 2010); Matter of Scarlata, 979 F.2d 521, 524 (7th Cir. 1992); In re Kimzey, 761 F.2d 421, 424 (7th Cir. 1985). The plaintiffs bear the burden of proving that the debt should be excepted from discharge by a preponderance of the evidence. See, Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991).

Civil (non-criminal) law recognizes two broad categories of law which govern the obligations of one person to another – contract and tort. Although they may at times intersect, in general these two bodies of law are separate and distinct from one another, each having its own requirements for such things as the elements of proof and the measure of damages. Despite this, there is often a tendency to blur the line which separates contract from tort and to try to characterize one type of claim as the other. For example, litigants may try to transform what is really a claim for breach of contract into some type of fraud, in an effort to avoid limitations on damages associated with contract, but not tort, claims. See e.g., Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981 (7th Cir. 2005); All-Tech Telecom, Inc. v Amway Corp. 174 F.3d 863 (7th Cir. 1999). In this court, the motivation to do so comes from the fact that debts arising out of a breach of contract are dischargeable while those which arise out of fraud or willful and malicious injury are not. 11 U.S.C. §§ 523(a)(2), (a)(6). Thus, creditors who want to preserve the opportunity to collect the amount due them from a debtor have every incentive to try to recharacterize what is really nothing more than a “simple” breach of contract into something else. That is what has happened here.

The plaintiffs contend the Hartford estimate (the basis for the parties’ agreement for the scope

of the work to be completed) represented the quality of the work to be performed and that the plaintiff's work failed to meet that standard. They claim that a number of things were never completed, that many of the things that were completed were done poorly and that the defendant, in general, showed reckless disregard for the entire project. For example, the plaintiffs claim that the defendant used the wrong materials, particularly when it came to the insulation, that he did not replace some doors, used lower quality cabinets in the kitchen, and failed to properly replace the roof. Furthermore they contend that the defendant "cut corners" and failed to properly supervise the sub-contractors he used and that failure led to many of the problems. Due to the generally poor quality of work, the fire and water damage to the plaintiffs' home has yet to be repaired and much of what has been done needs to be redone. The plaintiffs contend that because of all of this, the defendant committed some type of fraud and/or a willful and malicious injury such that any debt owed them should be non-dischargeable.

As for plaintiff's claims under § 523(a)(6) – willful and malicious injury – this portion of the Bankruptcy Code addresses liabilities for intentional torts, not contract. The plaintiff must prove "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawauhau v. Geiger, 523 U.S. 57, 61, 118 S.Ct. 974, 977 (1998) (emphasis original). "A 'knowing breach of contract'" does not qualify under that standard. Id. 523 U.S. at 62, 118 S.Ct. at 977. Consequently, the failure to perform a contract is not sufficient to except a debt from the scope of a bankruptcy discharge, In re Giquinto, 388 B.R. 152, 166 (Bankr. E.D. Pa. 2008); In re Barr, 194 B.R. 1009, 1017-18 (Bankr. N.D. Ill. 1996); In re Guy, 101 B.R. 961, 978-979 (Bankr. N.D. Ind. 1988); In re Cortese, 77 B.R. 961 (Bankr. S.D. Fla. 1987), and even an intentional breach of contract will not create a non-dischargeable debt, unless the breach is accompanied by conduct that is also

tortious. In re Williams, 337 F.3d 504, 509-10 (5th Cir. 2003); Petralia v. Jerich, 238 F.3d 1202, 1205-06 (9th Cir. 2001); In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992). See also, Jendus-Nicolai v. Larsen, 677 F.3d 320, 324 (7th Cir. 2012); In re Lazzara, 287 B.R. 714, 722 (Bankr. N.D. Ill. 2002) (applying §523(a)(6)). Plaintiff has presented no such evidence. Accord, See, In re Isaacson, 478 B.R. 763, 782 (Bankr. E.D. Va. 2012); In re Iberg, 395 B.R. 83 (Bankr. E.D. Ark. 2008); Stevens v. Antonious, 358 B.R. 172, 187-88 (Bankr. E.D. Pa. 2006); Rezin v. Barr, 194 B.R. 1009, 1024 (Bankr. N.D. Ill. 1996); In re Fogarty, 2010 WL 916818 *11 (Bankr. D. Mass. 2010); In re Bandi, 2010 WL 4024769 *3-4 (Bankr. E.D. La. 2010); In re Dorado, 400 B.R. 304, 311 (Bankr. D. N.M. 2008) (all finding defective construction is not a willful and malicious injury).

To be non-dischargeable under § 523(a)(2), a debt must have been obtained by fraud, and fraud requires more than a breach of promise. In re Davis, 638 F.3d 549, 554 (7th Cir. 2011); United States of America ex. rel. Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005). The creditor needs to prove that “fraud existed at the inception of the debt,” In re Gennaro, 12 B.R. 4, 6 (Bankr. W.D. Pa. 1981), or that it was fraudulently induced to enter into the underlying contract, such as where the debtor entered into a contract with no intention of performing it. Giquinto, 388 B.R. at 166-167; Barr, 194 B.R. at 1017-18; Guy, 101 B.R. at 978-79. See also, Main v. Oakland City University, 426 F.3d at 917; Perlman v. Zell, 185 F.3d 850, 852 (7th Cir.1999).

As for the plaintiffs’ complaints regarding representations concerning the quality of work to be performed, that is not the stuff of which fraud is made. Such generalized representations concerning quality, ability, and similar expressions of opinion are not sufficiently specific to support a claim for misrepresentation when expectations end up being disappointed. See, In re Purington, 2012 WL 1945510 *10 (Bankr. D. N.J. 2012) (“A contractor’s general representations regarding his

expected work performance and the actual quality of that workmanship do not qualify as misrepresentations for the purposes of section 523(a)(2)(A).”). See also, Deming v. Darling, 20 N.E. 107 (Mass. 1889) (“The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed.”). These types of representations constitute mere puffery which cannot be the basis for fraud. See, Searls v. Glasser, 64 F.3d 1061, 1066 (7th Cir. 1995); Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1299 (7th Cir. 1993); Royal Business Machines v. Lorraine Corp., 633 F.2d 34 (7th Cir. 1980); In re Barr, 194 B.R. 1009, 1019 (Bankr. N.D. Ill. 1996).

Performing substandard work does not support a claim for fraud. See e.g., In re Henderson, 423 B.R. 598, 622 (Bankr. N.D. N.Y. 2010) (“Substandard performance or a mere breach of the construction contract do not rise to the level of fraud necessary to except the debt from discharge.”); In re Wiszniewski, 2010 WL 3488960 *5 (Bankr. N.D. Ill. 2010); In re Rodruck, 2010 WL 1740792 (Bankr. S.D. Iowa 2010); In re Horton, 372 B.R. 349, 356 (Bankr. W.D. Ky. 2007); In re Semora, 204 B.R. 26, 28 (Bankr. E.D. Ark. 1996) (poor construction work and a contractor’s inattentiveness not proof of fraudulent intent); In re Kaufmann, 57 B.R. 644, 647 (Bankr. E.D. Wis. 1986) (contractor “having bitten off more than he could chew” is not fraud). Unless the plaintiffs are able to prove that the defendant had no intention of performing the work under the parties’ agreement, the failure to do so constitutes nothing more than a breach of contract and not a claim for fraud. In re Guy, 101 B.R. at 978; In re Faulk, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986). See also, F.D.I.C. v. Perry Brothers, Inc., 854 F. Supp. 1248, 1267 (E.D. Tex. 1994).

Here, there is no evidence that the defendant had no intention of properly performing the

work he agreed to. Rather, the parties agree that the defendant began work shortly after the fire in July 2008 and remained on the job until the plaintiffs told him not to return in January 2009. During the time he was performing the work, whenever the plaintiffs told him that something had not been done satisfactorily, he would redo it in order to satisfy the defendants. As to the allegation that the cabinets he used were of inferior quality, there was no evidence that this was deliberately so. Rather, the testimony indicated that the information provided to the defendant as to the brand and model of the cabinets initially used in the house was insufficient to find identical replacements and the defendant did the best he could with the information given to find cabinets which satisfied the plaintiffs' desires. In a similar vein, the plaintiffs contend that the defendant used the wrong materials when replacing insulation and that he might have done so when replacing the roof; but using the wrong materials is not fraud. The facts before the court and evidence presented to it demonstrate, at best, a breach of contract, not fraud. Accord, Giquinto, 388 B.R. at 166; Henderson, 423 B.R. at 622; Wiszniewski, 2010 WL 3488960 *5; In re Rodruck, 2010 WL 1740792; Horton, 372 B.R. at 356; Semora, 204 B.R. at 28; Kaufmann, 57 B.R. at 647; Barr, 194 B.R. 1009.

Defendant's obligation to the plaintiffs is a dischargeable debt. Judgment will be entered accordingly.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court